SEARCH AND SEIZURE – INDEPENDENT SOURCE DOCTRINE – Revised 11/2009

The exclusionary rule is a device created by the courts to exclude evidence which was obtained illegally. The rationale behind the exclusionary rule is that if illegally obtained evidence is inadmissible, officers will be deterred from obtaining evidence illegally. E.g., *Hudson v. Michigan*, 547 U.S. 586, 625, 126 S.Ct. 2159, 2185 (2006). As the exclusionary rule was being developed, the courts created several exceptions to the rule. One such exception is the independent source doctrine. It was first enunciated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) [*quoted* in *State v. Hackman,* 189 Ariz. 505, 508, 943 P.2d 865, 868 (App. 1997)]:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, ...

Thus, to be admissible under the independent source exception, the evidence must have been obtained through a lawful source independent of the unlawful source.

In *Murray v. United States*, 487 U.S. 533 (1988), the United States Supreme Court applied the independent source exception to evidence which was initially discovered during an illegal search. While conducting a surveillance of drug suspects, federal agents saw them drive into a warehouse and drive out 20 minutes later. The vehicles were ultimately stopped and found to contain marijuana. Before obtaining a search warrant, the agents forced their way into the warehouse and discovered numerous burlap-covered bales. Without disturbing the bales, the agents departed to

seek a search warrant, leaving the warehouse under surveillance. In the affidavit of probable cause, the agents neither referred to the prior entry nor relied on any observations made during that entry. After a magistrate issued the warrant, the agents re-entered the warehouse and seized 270 bales of marijuana, plus notebooks listing customers for the bales.

The defendants moved to suppress the marijuana on the grounds that evidence obtained in violation of the Fourth Amendment should be excluded to deter government misconduct. They argued that the "independent source" doctrine applied only to evidence obtained for the first time during a lawful independent search, not to evidence obtained for the first time after an illegal search. The Supreme Court disagreed and held that the evidence should be admitted. The Court cited and quoted from *Nix v. Williams*, 467 U.S. 431, 443 (1984), a case dealing with "inevitable discovery":

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray, 487 U.S. at 536.

The Court then reasoned that the inevitable discovery doctrine "obviously assumes the validity of the independent source doctrine as applied to evidence initially acquired unlawfully":

> The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.

Id. at 539. The Court went on to reason that excluding the evidence would not serve the purposes of the exclusionary rule:

> Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a worse one.

Id. at 542. The Court held that the test for the independent source doctrine is "whether the [lawful source] was in fact a genuinely independent source of the evidence at issue," because so long as the later, lawful seizure was genuinely independent of the earlier tainted entry, "There is no reason why the independent source doctrine should not apply." *Id.* However, the Court said that the lawful search in *Murray* would not be independent if either: 1) the agents' decision to seek a warrant was prompted by what they had seen during the initial entry: or 2) information obtained during that entry was presented to the magistrate and affected his decision to issue the warrant. The Court remanded the case to the trial court to determine whether the warrant-authorized search was in fact genuinely independent.

In a factually similar case, the Arizona Supreme Court also applied the independent source doctrine to admit evidence that the defendant characterized as excludable. In *State v. Gulbrandson*, 184 Ariz. 46, 906 P.2d 579 (1995), Gulbrandson bound and brutally murdered the victim. The police immediately suspected Gulbrandson and set up a surveillance at his apartment. When no one had entered or come out in some time, "police officers conducted a 'check-welfare' sweep of the apartment . . .

because they were concerned that defendant might have been injured in the struggle with [the victim]."*Id*. at 54, 906 P.2d at 587. The State conceded that this original entry was illegal. While inside, the officers found bloody papers and clothing. Like the agents in *Murray*, the officers did not disturb any of the items which they saw. However, unlike the agents in *Murray*, these officers referred to knowledge they had gained in the illegal entry when obtaining the warrant. *Gulbrandson*, 184 Ariz. at 54, 906 P.2d at 587. When the officers returned with the warrant, they seized the bloody items and found other incriminating evidence.

Gulbrandson moved to suppress the evidence seized during the warrant search because the earlier entry had been illegal. The Arizona Supreme Court quoted extensively from *Murray* as it applied the independent source exception. The Court held that using illegally obtained information when seeking a warrant does not automatically result in exclusion of all evidence gathered pursuant to it:

> The proper method for determining the validity of the search is to excise the illegally obtained information from the affidavit and then determine whether the remaining information is sufficient to establish probable cause. In addition, the state must show that information gained from the illegal entry did not affect the officers' decision to seek the warrant or the magistrate's decision to grant it.

Gulbrandson, 184 Ariz. at 58, 906 P.2d at 591. The Court ruled that the evidence was properly admissible because the affidavit for the search warrant contained substantial information from independent sources supporting probable cause. In addition, the Court noted that the trial court had found that the detective's intent to seek the warrant was formed before the first, illegal entry.

In *State v. Hackman*, 189 Ariz. 505, 943 P.2d 865 (App. 1997), the Court of Appeals applied the independent source doctrine to uphold the admission of evidence obtained in violation of a defendant's right to counsel. Hackman was arrested for sexual assault; when being questioned by police, he admitted the sex acts but said they were consensual and that the woman had telephoned him to invite him to her home to perform those acts. Hackman said that a friend of his had overheard his end of the conversation and could confirm that the woman had invited him, and said that the friend's telephone number was in his property being held at the jail. Hackman was subsequently indicted and the court appointed the public defender to represent him. Before trial, a State's investigator obtained a search warrant to go through Hackman's property bag at the jail and look for the friend's number. The investigator did not notify Hackman's defense counsel, but the investigator personally served the warrant on Hackman in jail and obtained additional statements from Hackman, as well as obtaining the friend's telephone number. Hackman moved to suppress the telephone number and the identity of the friend because the investigator had violated his Sixth Amendment right to counsel. The trial court suppressed the evidence, and the State appealed. Citing *Murray, supra*, the Court of Appeals reversed, holding that the independent source doctrine supported admission of the evidence. The Court reasoned that the State knew the friend's name, and knew that the telephone number was in Hackman's property at the jail, because Hackman had given that information to the police when they originally interviewed him. The warrant was based on the information from that interview. Thus, the warrant was itself proof of the independent source of the state's knowledge because it was clearly untainted by the later violation of Hackman's rights.